

Clarke (Migration) [2017] AATA 1924 (12 October 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Jennifer Laurie Clarke
CASE NUMBER:	1617580
DIBP REFERENCE(S):	BCC2015/1359293
MEMBER:	Hugh Sanderson
DATE:	12 October 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A •

Statement made on 12 October 2017 at 9:05am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Financial arrangements – De facto relationship – Consistent information

LEGISLATION

Migration Act 1958, ss 5CB, 5F, 65

Migration Regulations 1994, Schedule 2, r 1.09A, cl 820.211, cl 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 13 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 11 May 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate found that at the time of the application the parties had not been in a de facto relationship, as defined in s.5CB of the Act, for a least 12 months ending immediately before the date of the application and therefore did not meet the additional requirements in reg.2.03A and there was no reason to waive those requirements.

BACKGROUND

4. The applicant is a citizen of the United States and is currently 32 years old. The sponsor of the applicant is David Clarke. He was born in Australia and is an Australian citizen. He is currently 35 years old.
5. The parties claim that they first met each other on 9 April 2014. They claimed that they committed to a shared life together to the exclusion of all others and commenced a de facto relationship on 10 May 2014. They started living together in Australia on 12 September 2014. The application for the Partner visa was filed on 11 May 2015. The parties were married on 10 December 2016.
6. The applicant's movement records show that from the time that she first met the sponsor in Australia until the filing of the application she has travelled out of Australia as follows:
 - From 12 April 2014 to 13 June 2014;
 - From 16 June 2014 to 7 August 2014;
 - From 11 August 2014 to 12 September 2014;
 - from 9 October 2014 to 21 October 2014;
 - From 24 October 2014 to 2 November 2014;
 - From 20 December 2014 to 31 January 2015;
 - From 14 April 2015 to 25 April 2015.
7. The sponsor's movement records show that from the time he first met the applicant in Australia until the filing of the application he has travelled out of Australia as follows:
 - From 9 May 2014 to 18 May 2014;
 - From 6 June 2014 to 9 June 2014;
 - From 27 June 2014 to 14 July 2014;
 - From 25 July 2014 to 27 July 2014;
 - From 23 August 2014 to 26 August 2014;

- From 2 September 2014 to 7 September 2014;
 - From 24 October 2014 to 2 November 2014;
 - From 20 December 2014 to 4 January 2015.
8. Various documents were provided in support of the application. Statements were provided by friends and relatives attesting to the genuineness of the relationship.
9. The delegate who considered the application noted the following issues:
- There was little information as to the financial aspects of the relationship;
 - Despite claims that the sponsor was supporting the applicant, there was no information to support this claim, particularly from the time that the parties claim to have started their de facto relationship in May 2014;
 - There was information that the parties were currently living in a shared household and they had claimed to have moved in to live with each other on 19 September 2014, however there was nothing to indicate they had established a household together in the 12 months prior to the lodgement of the application;
 - The statements provided by friends and relatives do not provide information as to when the relationship started;
 - Although photos were provided of the parties together, they do not established that their relationship is recognised as being in a de facto relationship from May 2014 and that it was only later that this relationship developed;
 - The parties did not appear to have committed to a long-term relationship or have a mutual commitment to a shared life to the exclusion of all others until they started living together in September 2014 and not 12 months immediately before the filing of the application.
10. Taking these matters into account, the delegate was not satisfied that the parties had been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application and therefore did not meet the criteria in reg.2.03A(3). The delegate was not satisfied that there were compelling and compassionate circumstances for the grant of the visa despite not meeting this criteria and that they did not meet the requirements of reg.2.03A(4) or (5) so that the criteria did not apply.
11. As the delegate found the parties did not meet the criteria in reg.2.03A the delegate found that the applicant did not meet the definition of a de facto partner in s.5CB and therefore did not meet the criteria in cl.820.211(2). The delegate found that the applicant did not meet any of the alternate criteria and refused the application.

INFORMATION TO THE TRIBUNAL

12. The applicant provided further information to the Tribunal including the following:
- Marriage certificate of the parties dated 10 December 2016;
 - Details of the parties purchase of a property in New Zealand in October 2016;
 - Numerous photos of the parties together;
 - Scrapbooks of the parties relationship;
 - Email correspondence from June 2014 in relation to the sponsor making arrangements for the travel agent for travel for him and the applicant to Nepal; and

- Evidence of financial transfers between the parties.

13. The parties provided statements where they made the following claims:

- They made a commitment to live in a de facto relationship with each other at the start of May 2014;
- Although the applicant was living at that time in New Zealand and the sponsor in Australia, they would each travel between the countries so that they were with each other at least every second weekend;
- At times the sponsor would spend longer time with the applicant in her home, looking after the house, while she went to work;
- The travel and associated costs of being with each other was a significant financial commitment for both of them and they supported each other over this time;
- The applicant was unable to move to live with the sponsor in Australia as she was on a two-year employment contract and breaking that contract would have severe financial repercussions;
- The parties had a joint Chase Bank credit card to enable international transfers of money at a lower cost;
- The sponsor funded the applicant's move to Australia; and
- The parties have since purchased a property together in New Zealand.

14. The applicant appeared before the Tribunal on 11 October 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, his mother and a long term friend of the sponsor.

15. The parties gave consistent information about various aspects of their relationship, and in particular to the events that led to what they considered the start of their de facto relationship on 10 May 2014 in the continuation of that relationship after that time, even though they did not live in the same country.

16. The sponsor's mother and a long-time friend of the sponsor gave evidence as to the fact that they were aware that the parties had committed to a de facto relationship with each other in May 2014, even though they were not living in the same country. They provided details of contact they had with both the applicant and the sponsor and the way that they were aware of the de facto relationship that the parties were in.

17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether at the time of the application and for at least the period of 12 months ending immediately before the date of the application the applicant was the de facto spouse of the sponsoring partner.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

19. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

20. As the parties were at the time of the application not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
21. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
22. Extensive material has been provided which indicates that the parties were at the time of the application in a de facto relationship with each other as defined in s.5CB of the Act. Further material has been provided that at the time of the decision that the applicant and sponsor are now married and that the applicant is the spouse of the sponsoring partner as defined in s.5F of the Act.
23. The parties provided information to show that they are sharing their income to meet the day-to-day household expenses. They were, at the time of the application, living together in the home of the sponsor and using their combined resources to meet the expenses of that home. They were making plans for their financial future, including preparing wills making each other beneficiaries and had plans to purchase property together, which they have since done. All the financial aspects of the relationship indicate that at the time of the application and at the time of this decision the parties were in a mutually exclusive and genuine and continuing relationship and that they were and continue to be living together.
24. At the time of the application, the applicant had moved to Australia to live with the applicant in the home he was previously living in. The parties provided details of the arrangements in the home which showed that they were sharing the responsibility for the maintenance of that home as well as cooking for each other. The Tribunal finds the parties had, at the time of the application and continue at the time of this decision, established a household which is indicative of the parties living in a mutually exclusive relationship and that the relationship is genuine and continuing.
25. The parties had a very active social life together involving various active outside pursuits. Statements have been provided by their friends and relatives attesting to the fact that they consider the parties to be in a genuine and continuing relationship. The parties were married on 10 December 2016. Photos of the wedding have been provided which show the attendance of many family members and friends at that wedding. The Tribunal finds that the parties did, at the time of the application and continue at the time of this decision, represent themselves as being in a committed relationship to each other, originally in a de facto relationship and now in a marriage relationship, and that this relationship is accepted and recognised by their friends and family. The parties have undertaken in the past numerous social activities together as a couple and continue to do so.
26. The parties have shown a high degree of commitment to each other. They first met each other on 9 April 2014 and claim to have started their de facto relationship with each other on 10 May 2014. This issue as to when the relationship started is discussed further below. They commenced living together in Australia on 12 September 2014. They have now been in a relationship for more than three years. They were married on 10 December 2016.

27. The parties have displayed a high degree of companionship and emotional support to each other. Both parties have suffered injuries arising from their various social activities and have been supported by each other in recovering from his injuries. They have provided details of their plans for their future and consider their relationship as long-term. They have travelled together to be able to spend time with each other's families in the United States and in Australia. The Tribunal is satisfied that the parties have displayed the degree of commitment to their relationship which indicates that they are in a mutually exclusive relationship and that the relationship is genuine and continuing.
28. The parties are not related by family.
29. Taking all the matters into account, the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of all others, that their relationship is genuine and continuing, that they live together on a permanent basis and that they are not related by family. Accordingly, the Tribunal is satisfied that at the time of the application the applicant was the de facto partner of the sponsor as defined in s.5CB of the Act. Further, the Tribunal is satisfied that at the time of the decision the applicant is the spouse of the sponsoring partner as defined in s.5F of the Act.

WERE THE PARTIES IN THE DE FACTO RELATIONSHIP FOR AT LEAST THE PERIOD OF 12 MONTHS ENDING IMMEDIATELY BEFORE THE DATE OF THE APPLICATION?

30. Regulation 2.03A provides additional criteria that are applicable to de facto partners. In relation to the applicant, the criteria provides that if she cannot establish compelling and compassionate circumstances for the grant of the visa the Minister must be satisfied that the applicant has been in the de facto relationship for at least the period 12 months ending immediately before the date of the application. The applicant did not register their de facto relationship under the law of any State or Territory.
31. The evidence of the parties is that they first met each other in Australia 9 April 2014. At that time, the applicant was living and working in New Zealand and the sponsor was living and working in Australia. They claim to have commenced their de facto relationship on 10 May 2014. The applicant moved to Australia on 12 September 2014 and apart as claimed that they started living together in the sponsor's home.
32. As the application for the Partner visa was filed on 11 May 2015, the applicant must show that she and the sponsor were in a de facto relationship commencing not later than 11 May 2014.
33. At the time the applicant filed the Partner visa application, she held a subclass 462 Work and Holiday visa. This visa did not expire until 31 January 2016. The applicant was aware that she was required to show that for the 12 months prior to the filing of the application she had been in a de facto relationship with the sponsor. If she considered that they only commenced their relationship when they started living together in the sponsor's home in Canberra then she would have been able to wait until any time after 12 September 2015, 12 months after they had been living together there, to file the application. The reason the applicant filed the Partner visa application when she did was because both she and the sponsor considered the start of their de facto relationship to have been on 10 May 2014 due to the particular events at that time and the nature of the relationship after then.
34. The evidence of the parties is that after the sponsor travelled to New Zealand on 9 May 2014 they had a serious conversation about their relationship and what they expected from it. This included discussions about immediate and long-term plans and making arrangements to organise their affairs to be together and in what country they should live once the applicant's work in New Zealand ceased. Although the parties had only first met each other on 9 April

2014, they had already engaged in significant communication with each other over the Internet and by telephone. They had both experienced relationship breakdowns and were not willing to commit to any other relationship unless they were certain that it would be long-lasting.

35. The reason the parties were not able to start living together immediately they decided to commit to the relationship was that the sponsor could not leave his job in Canberra and the applicant was engaged in a two-year contract for her employer in New Zealand which, if she broke, would lead to significant financial penalties. As this contract would be ending in September 2014 they agreed to maintain their de facto relationship from afar.
36. At that time, the parties made financial arrangements to be able to support each other and transfer money to each other for their financial support. The sponsor had made plans for a holiday in Nepal. He made arrangements and paid for the applicant to accompany him on that holiday. Those plans, unfortunately, were cancelled because the applicant's dog was ill. That the sponsor was willing to cancel his holiday to support the applicant indicates the degree of commitment they had to the relationship at that time.
37. Although limited, the Tribunal finds that the parties were pooling their financial resources at this time and, when together, sharing their day-to-day household expenses.
38. The parties' relationship was recognised by friends and family at that time as being genuine. The parties' use of social media at that time showed that they were in a committed relationship. The sponsor's mother gave evidence, which the Tribunal accepts, that she was aware of her son's relationship with the applicant from 10 May 2014 and that she considered that they were in a de facto relationship from that time, even though they were living in separate countries. She stated that it did not surprise her that her son had committed to the relationship only a short time after he had met the applicant as that was in his nature.
39. The parties were actively participating in joint social activities both in Australia and New Zealand. The movement records of the parties confirm that as best they were able to they would travel to be with each other at least every fortnight over the time they were living in separate countries. Their relationship was recognised by their friends and family as genuine and more than just as boyfriend and girlfriend.
40. Although the parties had known each other for only a short period of time before committing to a relationship on 10 May 2014, they displayed a high degree of companionship and emotional support from that date. The applicant broke her wrist in late June 2014. The sponsor, with some difficulty, arranged to have leave from his work so that he was able to travel to New Zealand and look after the applicant for a period of over two weeks.
41. As indicated above, the parties before committing to their relationship on 10 May 2014 had a detailed discussion about what they considered their future would be. They discussed issues such as in which country they should live, plans to saving money to be able to travel to the United States, plans for purchasing property together and whether they wish to have any children. The Tribunal is satisfied that from 10 May 2014 the commitment the parties showed to each other and their relationship is indicative that they had commenced a de facto relationship at that time.
42. The Tribunal has considered all the circumstances of the parties and whether their de facto relationship had commenced by 10 May 2014. The Tribunal is satisfied that even though the parties were living in separate countries the parties did commence their relationship on 10 May 2014 and continue to be in a de facto relationship after that date. The only reason the parties remained living in separate countries is because of the financial penalties the sponsor would incur if she left her employment within the two-year period for which she had

committed. The Tribunal finds they did not live separately and apart on a permanent basis. The applicant immediately came to Australia to live with the applicant as soon as her employment contract was finalised. Over the time that the parties were living in separate countries they pooled their financial resources to be able to meet major commitments together and shared the day-to-day household expenses when they were living together. When they were living together their arrangements were indicative of parties living together in a genuine and continuing relationship. They showed a high degree of commitment to the relationship which was recognised by all their friends and family.

43. For the above reasons, the Tribunal finds that the applicant had been in the de facto relationship with the sponsor for at least the period of 12 months ending immediately before the date of the application. Accordingly, the Tribunal is satisfied the requirements of reg.2.03A are met.

FINDINGS OF THE CRITERIA

44. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB and reg.2.03A are met at the time the visa application was made. Therefore the applicant meets cl.820.211(2)(a).
45. At the time of the application, the applicant was sponsored by her de facto partner who had turned 18. Accordingly the applicant meets cl.820.211(2)(c). The parties are now married and the applicant continues to be sponsored by her spouse.
46. The applicant at the time of the application held a substantive visa accordingly the criteria in cl.820.211(2)(d) is not relevant.
47. The Tribunal finds the applicant meets cl.820.211(2). The Tribunal finds further that the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision and therefore meets the criteria in cl.820.221.
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

49. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Hugh Sanderson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).